Supreme Court, U.S.
FILED
FEB 23 1998
OFFICE OF THE CLERK

No. 97 1387

IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

JASON SCOTT ROOF,
*Petitioner,*

v.

PEOPLE OF THE STATE OF MICHIGAN,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MICHIGAN

## PETITION FOR WRIT OF CERTIORARI

DAVID A. DODGE
*COUNSEL OF RECORD*

DAVID A. DODGE, P.C.
200 NORTH DIVISION AVENUE
GRAND RAPIDS, MICHIGAN 49503
(616) 459-3850

*COUNSEL FOR PETITIONER*

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

92 pp

## ISSUE PRESENTED FOR REVIEW

THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER THE MICHIGAN COURTS ERRED WHEN THEY CONCLUDED THAT AN EDITED VIDEO TAPE COULD BE ADMITTED IN EVIDENCE, PLAYED TO THE JURY, AND TAKEN BACK INTO THE JURY ROOM IN THE ABSENCE OF ANY PROCEDURAL SAFEGUARDS TO ASSURE THE INTEGRITY OR PROPRIETY OF THE EDITING PROCESS. THE COURT SHOULD ALSO CONSIDER THE FACT THAT AN ERRONEOUS STANDARD OF REVIEW WAS USED TO EVALUATE AN ISSUE WITH FEDERAL CONSTITUTIONAL IMPLICATIONS.

## TABLE OF CONTENTS


Page

QUESTION PRESENTED . . . . . i

TABLE OF AUTHORITIES . . . . . v

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 1

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED . . . . . 2

INTRODUCTION . . . . . 2

STATEMENT OF THE CASE . . . . . 4

REASONS FOR GRANTING THE WRIT . . . . . 9

THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER THE MICHIGAN COURTS ERRED WHEN THEY CONCLUDED THAT AN EDITED VIDEO TAPE COULD BE ADMITTED IN EVIDENCE, PLAYED TO THE JURY, AND TAKEN BACK INTO THE JURY ROOM IN THE ABSENCE OF ANY PROCEDURAL SAFEGUARDS TO ASSURE THE INTEGRITY OR PROPRIETY OF THE EDITING PROCESS. THE COURT SHOULD ALSO CONSIDER THE FACT THAT AN ERRONEOUS STANDARD OF

REVIEW WAS USED TO EVALUATE AN ISSUE WITH FEDERAL CONSTITUTIONAL IMPLICATIONS . . . . . 9

CONCLUSION . . . . . 19

APPENDICES

**Appendix A**
Opinion of the Michigan Supreme Court, dated November 25, 1997 . . . . . A1

**Appendix B**
Opinion of the Michigan Court of Appeals, dated December 10, 1996 . . . . . A3

**Appendix C**
Opinion of the Michigan Court of Appeals, dated September 27, 1996 . . . . . A4

**Appendix D**
Judgment of Sentence and Commitment, dated August 29, 1994 . . . . . A9

**Appendix E**
Summary of Omissions from Video-Taped Post-Arrest Interview of Petitioner . . . . . A12

**Appendix F**
Motion for Rehearing, filed by Petitioner in Court of Appeals, dated November 4, 1996 . . . . . A17

**Appendix G**
Federal and State Constitutional Provisions . . . A27

**Appendix H**
Pertinent Excerpt from Application for Leave to Appeal, filed by Petitioner in the Michigan Supreme Court, dated December 30, 1996 . . . . . A29

## TABLE OF AUTHORITIES


Page

Cases:

Brady v. Maryland,
373 U.S. 83 (1963) . . . . . 12

California v. Trombetta,
467 U.S. 479 (1984) . . . . . 12

Douglas v. California,
372 U.S. 353 (1963) . . . . . 12

Duncan v. Louisiana,
391 U.S. 145 (1968) . . . . . 11

Evitts v. Lucey,
469 U.S. 387 (1985) . . . . . 12

Fagan V. Washington,
942 F.2d 1155 (7th Cir. 1991) . . . . . 18

Fox v. District of Columbia,
83 F.3d 1491(D.C.Cir. 1996) . . . . . 18

Fountain v. United States,
384 F.2d 624 (5th Cir. 1967) . . . . . 13

Meyer v. Nebraska,
262 U.S. 390 (1923) . . . . . 12

Oklahoma City v. Tuttle,
471 U.S. 808 (1985) . . . . . 18

Ornelas v. United States,
---U.S.---, 116 S.Ct. 1657 (1996) . . . . . 17

People v. Hamacher,
432 Mich 157, 438 N.W.2d 43 (1989) . . . . . 18

People v. Lester,
172 Mich App 769,432 N.W.2d 433 (1988) . . . 14

People v. Schram,
92 Mich App 292,296 N.W.2d 840 (1980) . . . . 13

Rochin v. California,
342 U.S. 165 (1952) . . . . . 12

Ryan v. Royal Ins. Co.,
916 F.2d 731 (1st Cir. 1990) . . . . . 18

United States v. Carson,
969 F.2d 1480 (3d Cir. 1992) . . . . . 11

United States v. Doe,
53 F.3d 1081 (9th Cir. 1995) . . . . . 18

United States v. Gomez,
67 F.3d 1515 (10th Cir. 1995) . . . . . 11

United States v. Hall,
342 F.2d 849 (4th Cir. 1965) . . . . . 13

United States v. Ojeda Rios,
495 U.S. 257 (1990) . . . . . 11

United States v. Olano,
507 U.S. 725 (1993) . . . . . 17

United States v. Schlesinger,
49 F.3d 483 (9th Cir. 1995) . . . . . 18

United States v. Young,
470 U.S. 1 (1985) . . . . . 17

Wilson v. Kelkhoff,
86 F.3d 1438 (7th Cir. 1996) . . . . . 18

Constitutional Provisions:

1963 Const. Art. 6, § 4 . . . . . 1

1963 Const. Art. 6, § 10 . . . . . 1

1963 Const. Art. 6, § 13 . . . . . 1

United States Constitution, Amendment V . . . . . 2, 12

United States Constitution, Amendment VI . . . . . 2

United States Constitution, Amendment XIV . . . . . 2. 12

Statutes:

MCL 600.215 . . . . . 1

MCL 600.308 . . . . . 1

MCL 600.601 . . . . . 1

28 U.S.C. 1257(a) . . . . . 1

Court Rules:

MCR 7.203(A)(1) . . . . . 1

MCR 7.301(A) . . . . . 1

MRE 1001(4) . . . . . 2

MRE 1002 . . . . . 2

MRE 1003 . . . . . 2

Jason Scott Roof respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of Michigan entered in this case on November 25, 1997.

## OPINIONS BELOW

The opinion of the Michigan Supreme Court denying leave to appeal is unreported. It is reprinted in the appendix hereto ("App.") at A1-A2. The opinion of the Michigan Court of Appeals affirming the defendant's conviction on September 27, 1996 is also unreported. It is reprinted at App. at A4-A8. The opinion of the Michigan Court of Appeals on December 10, 1996 denying rehearing is unreported and is reprinted at App. at A3. Excerpts from pertinent pleadings, which are the only places in the record which confirm the presentation of issues to the Michigan Courts, are reprinted at App. at A12-A64.

## JURISDICTION

The Michigan Supreme Court entered judgment in this case on November 25, 1997. The jurisdiction of the Circuit Court of St. Clair County, Michigan was based upon 1963 Const. Art. 6, § 13 and MCL 600.601. The jurisdiction of the Michigan Court of Appeals was based upon 1963 Const. Art. 6, §10, MCL 600.308, and MCR 7.203(A)(1). The jurisdiction of the Michigan Supreme Court was based upon 1963 Const. Art. 6 § 4, MCL 600.215, and MCR 7.301(A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The case primarily involves the following statutes, rules, and constitutional provisions which are set forth in pertinent part at App. at A27-A28: United States Constitution, Amendments V, VI and XIV; 1963 Const. Art. 1, § 17; MRE 1001(4), 1002, 1003.

## INTRODUCTION

This Petition presents an important question for the Court's review and consideration. Specifically:

In an era where video tapes are being increasingly used by law enforcement, private citizens, and others to collect potential trial evidence, it is important to identify the procedures required to assure that the due process rights of a defendant are protected.

In the instant case, the sole issue was the petitioner's state of mind and whether he possessed the requisite intent to commit premeditated murder. The primary evidence against the petitioner was a video-taped confession. The video tape was altered, and a number of segments which related to the petitioner's state of mind were deleted. These deletions are summarized, as they were for the state courts, App. at A12-A16.

The edited version was admitted without any inquiry by the Court about whether the editing process protected or violated the petitioner's due process rights.

The petitioner respectfully submits that great opportunities for abuse are created when one party or another

to criminal litigation has the unfettered right to alter or edit evidence to produce a result favorable to the editor. A persuasive reason to grant certiorari would be for the purpose of identifying the minimum requirements of the Due Process Clause in a situation like the one presented by this case.

A related question focuses on the standard of review which should be used when reviewing a federal constitutional issue. It is a familiar rule that the failure to object in the trial court can waive appellate review or alternatively can cause that review to be made using a standard which is more unfavorable to the appellant than the standard would have been used had there been a timely objection. A number of courts have modified this rule by requiring the appellee to invoke the claim of waiver. If the appellee does not claim waiver, the courts have held that the appellee has effectively waived the waiver claim, with the result that the issue is reviewed on the merits as if a timely objection had been lodged.

In the instant case, the petitioner presented three appellate arguments that had not been preserved by timely objection in the trial court. As to two of the arguments, the prosecutor addressed the issue on the merits and did not claim waiver. However, the appellate court, sua sponte, held the appellant to a manifest injustice standard rather than an abuse of discretion standard and further held that the higher standard was not met.

The petitioner respectfully asks that certiorari be granted to clarify the responsibility of the appellee and to avoid the unfairness which results among similarly situated appellants if some appellate courts apply the waive the waiver rule and others do not.

## STATEMENT OF THE CASE

The petitioner, Jason Scott Roof, was charged with the stabbing murder of the 2 and ½ year old son of an acquaintance. One of the primary components of the State's case was a video-tape made of a police interview of the defendant. The interview, approximately two hours in length, took place at police headquarters several hours after the murder. During the interview, the petitioner described the crime and his role in it. The petitioner stated that when he walked into the room where the child was sleeping, he experienced a sudden mood change. He stated that he had not previously planned to harm the child and that he had acted on impulse. The petitioner first tried to strangle the child. When that didn't work, the petitioner stabbed the child to death with a knife that was coincidentally on a desk in the room. The tape also contained a number of statements about the petitioner's personal history, his mental difficulties, his use of various prescription medicines, and other problems in his life.

Other evidence showed that the petitioner tried to conceal the body in a nearby field. After the petitioner was confronted with bloody clothing by the child's mother and the police, he showed the police where the body was located.

At trial, the petitioner did not challenge his confession. Accordingly, the only issue was whether the defendant was guilty of first-degree premeditated murder as charged or whether he was guilty of some lesser offense.

At trial, two versions of the video-taped interview were introduced into evidence. One tape contained the full interview. A second tape was an edited version which was prepared by the Sheriff's Department. A schedule comparing the contents of the two tapes is attached at App. at A12-A16.

The trial judge made no inquiry about how the altered tape was prepared, and the prosecution proffered no explanation as to why it had altered the tape or what criteria were used to determine which parts of the tape would be edited. In fact, the redacted portions went in large part to evidence about the petitioner's mental instability, his anger, his violent tendencies, his attempt to seek help, and his use of medication in an attempt to control those problems. Said another way, the redacted version showed the petitioner in a cold and emotionless light. The unedited version provided both explanation and context to the petitioner's version of the events. Petitioner's trial counsel did not object to the editing procedure.

The prosecutor proceeded to show the altered tape to the jury. A written transcript of the altered tape was entered into the record. Petitioner's trial counsel showed some portions of the unedited tape to the jury. The portions shown to the jury by petitioner's attorney did not include all of the parts edited out by the prosecution. During deliberations, the jury requested permission to view the edited tape. That request was granted by the trial judge without objection. The jury never saw the unedited tape either in its entirety or the edited-out segments in the context or in the order in which those statements had been made.

The jury found the defendant guilty of first-degree murder, and he was ultimately sentenced to a mandatory sentence of life imprisonment with no possibility of parole. App. at A9-A11.

The petitioner appealed as of right to the Michigan Court of Appeals. The appellate court concluded that three of the issues raised by his appellate counsel were subject to review pursuant to a manifest injustice standard because there

were no objections made at trial. Specifically:

1. The petitioner argued that the trial court had abused its discretion when it admitted an edited version of the video-taped interview. The appellate court noted that this issue had not been raised below. The appellate court further concluded that there was no manifest injustice because the jury knew that the tape had been edited, because some of the redacted segments were played for the jury, and because the unedited tape had also been entered into evidence. App. at A5-A6.

2. The petitioner further argued that there was an instructional error when the Court did not instruct the jury about the evidentiary weight to be given to the video tape. The petitioner claimed that an error had occurred because the missing instruction went to the critical issue in the case, the petitioner's state of mind. Because there had been no objection below, the appellate court ruled that there was no manifest injustice because there were other instructions about the petitioner's state of mind. App. at A6.

3. Finally, the petitioner argued that he should have been allowed to declare his own medical witness a hostile witness and that, as a result, he should have been allowed to ask that witness leading questions. Again, because of lack of objection, the court reviewed for manifest injustice and found that none had occurred. App. at A6-A7.

The Court of Appeals also rejected the petitioner's other arguments and affirmed his conviction on September 27, 1996. App. at A4-A8.

Current counsel became involved with the case after the adverse decision by the Michigan Court of Appeals. A

timely Motion for Rehearing was filed. App. at A17-A26.[1] Among other things, the rehearing motion argued that the appellate court had erred when it used the manifest injustice standard of review with respect to the altered video tape issue. Specifically, the motion argued that the prosecutor's decision to address the issue on the merits in its brief, combined with a failure to argue for waiver and the less favorable standard of review, waived the issue. Accordingly, the petitioner submitted that the proper standard of review was the less rigorous abuse of discretion standard. Petitioner further argued that the less rigorous review standard would have resulted in a different decision because the use of the edited rather than the original version both violated the Michigan Rules of Evidence and the petitioner's due process rights. The Court of Appeals denied the Motion for Reconsideration without comment on December 10, 1996.

The petitioner then filed a timely Application for Leave to Appeal with the Michigan Supreme Court. App. at A29-A64.[2] That Application raised the issue which is raised in the instant Petition. Specifically, the petitioner argued that the appellate court had used the wrong standard of review because the prosecutor had waived the petitioner's lack of objection in the trial court by not asserting the issue in their opening/reply brief. The petitioner also argued the use of the

---

[1] The entire text of the Motion for Rehearing is included within the appendix because it is the only document in the record which indicates that the "waiver of the waiver" argument was raised at the first possible opportunity to do so.

[2] Pertinent parts of that Application are reproduced in the Appendix because the Application is the only place in the record that demonstrates that the issues presented to this Court were presented to the state court for review.

edited video tape without any attempt at procedural safeguards violated the petitioner's right to due process. Petitioner also argued that the admission of the edited tape violated the Michigan Rules of Evidence, particularly since the unedited version was available.[3]

The Michigan Supreme Court denied Leave to Appeal on November 25, 1997. App. at A1-A2. The Court made no substantive comments about the issues, and the language used in the Court's order was typical of language almost always used by the Court when it is denying leave to appeal.

---

[3] The pertinent Michigan Rules of Evidence are functionally identical to their counterparts in the Federal Rules of Evidence.

## REASONS FOR GRANTING THE WRIT

**THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER THE MICHIGAN COURTS ERRED WHEN THEY CONCLUDED THAT AN EDITED VIDEO TAPE COULD BE ADMITTED IN EVIDENCE, PLAYED TO THE JURY, AND TAKEN BACK INTO THE JURY ROOM IN THE ABSENCE OF ANY PROCEDURAL SAFEGUARDS TO ASSURE THE INTEGRITY OR PROPRIETY OF THE EDITING PROCESS. THE COURT SHOULD ALSO CONSIDER THE FACT THAT AN ERRONEOUS STANDARD OF REVIEW WAS USED TO EVALUATE AN ISSUE WITH FEDERAL CONSTITUTIONAL IMPLICATIONS.**

The first question presented in this case relates to an edited video tape. Shortly after the killing, the petitioner was taken to the police station and questioned. His interview was taped by the St. Clair County Sheriff's Department. During the interview, the petitioner admitted to the killing.

The tape was offered during the trial as evidence of the petitioner's guilt. App. at A42-A43. A county detective testified that the video had been edited for the purpose of focusing on the events of the evening. Id. The detective further stated that he had reviewed the edited video tape in its entirety and had initialed it. Id. The edited tape was admitted without objection. Id. The tape was played for the jury during the prosecution's case-in-chief. Id. It was also replayed during jury deliberations at the jury's request. Id.

The petitioner argued below that there were a number of threshold concerns about the procedures used by the trial court. Specifically:

1. The Petitioner noted that there was no specific information as to who did the actual editing. There was no information about the qualifications of that individual or individuals. There was no information about the editing methods used.

2. There was no information as to how the decision was made regarding what was edited and what was not. For example, the brief reference in the record to "events of the evening" did not specify the parameters of the editing process.[4]

3. The trial attorney had apparently not examined the tape prior to its being shown to the jury. There is nothing in the record which indicates whether the trial attorney had even been offered a meaningful opportunity to view the tape before it was offered by the prosecution during its case-in-chief.

4. There is also nothing in the record which indicates that the trial court had reviewed the edited tape prior to its presentation to the jury. Thus, that Court had no information which would have enabled it to determine whether the editing

---

[4] As an example of petitioner's concern, the edited tape contained statements by the petitioner about how he hated people and valued the friendship of animals more than the friendship of human beings.

This statement arguably had nothing to do with the actual killing or the events of the evening and seems more designed to paint the petitioner in an extremely unfavorable light.

process had maintained the integrity of the tape or whether the tape had been edited in such a way so as to skew the evidence in the prosecution's favor.

An analogous area of the law is the federal wiretap statute. 18 U.S.C. 2518(8)(a) provides that the fruits of electronic surveillance shall be sealed immediately. If the information is not immediately sealed, it is subject to suppression unless the Government can provide a satisfactory explanation for the delay. In United States v. Ojeda Rios, 495 U.S. 257 (1990), this Court explained that the purpose of this statute is to ensure the reliability and integrity of evidence obtained using electronic surveillance by ensuring, as much as possible, that the Government had no opportunity to tamper with, alter, or edit the recordings so obtained. See, also, United States v. Gomez, 67 F.3d 1515 (10th Cir. 1995); United States v. Carson, 969 F.2d 1480 (3d Cir. 1992). The clear inference to be drawn from these cases is that if the Government did alter the recordings in any fashion, the recordings would be suppressed since the purpose of the sealing process would have been thwarted.

Similarly, in the instant case, the integrity of the video taped interview was not maintained. The petitioner thus contends that what was shown to the jury was not an accurate representation of what occurred. Rather, it presented the events as the prosecution wanted the jury to see them. The potential for abuse in such a procedure is extremely troublesome. Carried to its extreme, it would give the prosecutor an unfettered license to create evidence which portrays events in the light most favorable to the prosecution. Such a procedure would violate the most fundamental principles of justice and fair play, as well as the petitioner's Sixth Amendment rights. Cf., Duncan v. Louisiana, 391 U.S. 145 (1968) (every defendant who chooses to be tried by

jury has a right to a fair and impartial trial). The rationale of this type of approach would support a rule which stated that any edited video tape would be precluded because the integrity of the evidence had been irretrievably compromised.

Petitioner also submits that the editing process implicates the Fifth and Fourteenth Amendments of the United States Constitution.[5] Those amendments guarantee every criminal defendant due process of law because every such defendant has a constitutionally protected liberty interest at stake. The issue is fundamental fairness, and when law enforcement and criminal procedure are at issue, the courts have been willing to examine closely any substantial threat to the fairness of the trial process. See, e.g., California v. Trombetta, 467 U.S. 479, 485 (1984); Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

Another formulation that this Court has used is whether the deprivation of the right would make the proceeding at issue a meaningless ritual. See, e.g., Evitts v. Lucey, 469 U.S. 387 (1985) (deprivation of effective assistance of counsel on the first appeal of right would violate the due process clause because without effective counsel, the appeal would be a meaningless ritual); Douglas v. California, 372 U.S. 353 (1963) (denial of any counsel whatsoever with respect to an appeal of right would make the appeal a meaningless ritual). Cf., Meyer v. Nebraska, 262 U.S. 390 (1923); Rochin v. California, 342 U.S. 165 (1952).

---

[5] A due process analysis might not be as restrictive as the analogy to the wiretap statute in that due process would likely allow the use of an edited tape as long as there were sufficient safeguards to assure that the editing process did not compromise fundamental fairness.

Since there were absolutely no procedural safeguards to ensure the integrity of the edited tape, the petitioner submits that he was denied due process. He further suggests that without some meaningful procedural protections, a trial could become a meaningless ritual in that the prosecution could present edited evidence which would make it difficult if not impossible for a criminal defendant to avoid conviction.

The petitioner also submits that due process requires, at the very minimum, close scrutiny of the procedures used to edit video tape or similar evidence to assure that evidence's integrity. Several Michigan cases suggest the type of procedures which might pass constitutional muster. For example, in People v. Schram, 92 Mich App 292, 296 N.W.2d 840 (1980), a security service recorded noises made during a burglary. The police made a filtered copy of the tape for the purpose of reducing background noise. The tape was not otherwise altered.

In order to insure the integrity of the filtering process, the trial judge listened to the testimony of an expert who explained how the filtering was done and who further explained that the filtering did not alter the original in any significant way. The trial judge also personally listened to both recordings and was thus able to personally conclude that the only difference between the original and filtered tape was the reduced amount of background noise.

Because of these precautions, the appellate court rejected a challenge to the admission of the tapes. The procedures used ensured that the filtered copy was an accurate reflection of the original and that the defendant's rights were accordingly protected. Cf., Fountain v. United States, 384 F.2d 624 (5th Cir. 1967); United States v. Hall, 342 F.2d 849 (4th Cir. 1965) (discussing the same issues).

By contrast, in the instant case, there was no meaningful testimony about how the edited tape was prepared. In addition, there is nothing in the record which indicates that the trial judge took any precautions to assure that the edited tape fairly reflected the content of the original.

In People v. Lester, 172 Mich App 769, 432 N.W.2d 433 (1988), a police informant recorded a conversation between the informant and the defendant. At trial, a non-verbatim transcript of the conversation was prepared. That transcript was distributed to the jury. The appellate court was concerned about the lack of safeguards in this procedure and the risk that the transcript could reflect subjective impressions of the police rather than the actual content of the statements made by the defendant.

As an example of the lack of safeguards, there was no stipulation between the parties as to the accuracy of the transcript. Additionally, the trial judge made no effort to ensure the transcript's accuracy. The trial judge did not listen to the tape before it was played to the jury, and the trial judge did not compare the content of the tape to the content of the non-verbatim transcript. The individual who prepared the transcript was not a witness.

The appellate court concluded that there were insufficient procedural safeguards. In order to avoid problems in other cases, the Court mandated that in the future, a stipulation should be sought as to the accuracy of the transcript. In the absence of a stipulation, the transcriber should be required to testify and to be cross-examined about the procedures used to produce the non-verbatim transcript. Finally, the trial judge should take steps to make an independent judicial determination about the accuracy and reliability of the non-verbatim transcript.

In the instant case, such procedural safeguards would have likely meant that the edited tape would not have been played. The edited tape reflected the subjective impressions of the police and the spin which the police and the prosecutor wished to place upon the interview. The omitted segments were necessary to put the petitioner's statements into perspective. Moreover, the original tape was available and could have been played to the jury.

For all of these reasons, the petitioner submits that due process concerns are an additional reason for this Court to grant Certiorari and to articulate the minimal constitutional protections required when the prosecution in a criminal case wishes to introduce edited evidence.

A further concern is the fact that the petitioner was prejudiced by the editing process. At the threshold, it is important to consider that the issue at trial was not the petitioner's guilt or innocence of some crime. The petitioner had admitted his guilt on the video tape, and he made no effort to recant his statements at trial. Accordingly, the issue at trial focused on the petitioner's mental state and whether he should be convicted of premeditated murder or some lesser offense.

The omissions from the tape are summarized in the Appendix. App. at A13-A16.[6] A review of those omissions indicate that the prosecutor's edited tape focused upon the actus reus or the crime itself. However, that was not the issue at trial. Rather, the issue was the petitioner's mens rea and whether he had sufficient intent to warrant a conviction for premeditated murder.

---

[6] This identical summary was presented below.

Said another way, the petitioner's defense focused upon a long-standing problem with rage and dealing with people. These problems made it very difficult for him to function in society, and he was very frustrated with his inability to accomplish a number of fundamental things in life. He suffered numerous mood swings and was at times out of touch with reality. The petitioner had been seen by numerous medical professionals, and he had been taking a variety of medications. These medications affected his moods. The petitioner also used alcohol to excess and had in fact ingested alcohol on the night of the incident. The petitioner had also taken Klonopin, a psychotropic medication, on the night of the incident. The interaction between Klonopin and alcohol was a factor which the jury could have and probably should have considered when assessing the petitioner's mental state.

Many of these factors were portrayed on the deleted segments. The editing of the tape thus produced a tape which did not portray the petitioner's contemporaneous explanations, all of which were consistent with his lack of mens rea defense.

As a result, the editing of the tape not only raises questions about general procedures but also focuses on the very specific prejudices that a murder defendant suffered in the presentation of his case.

An additional question relates to the standard of review which a State should use when reviewing a federal constitutional question. Since the standard chosen by the State--manifest injustice--was likely outcome determinative, the petitioner submits that that standard affected the way in which a constitutional question was decided. Accordingly, the petitioner believes that the question of the standard of review can be considered in conjunction with other

components of the video tape argument.

In recent years, this Court has agreed to review cases where the issue was either the proper standard of appellate review or the method by which a particular standard of review should be applied. See, e.g., United States v. Young, 470 U.S. 1 (1985) (the use of the plain error standard when evaluating an unobjected to claim of prosecutorial misconduct); United States v. Olano, 507 U.S. 725 (1993) (even if error plain, court should not exercise its discretion to correct it unless the error seriously impairs the integrity and basic fairness of the proceedings); Ornelas v. United States, ---U.S.---, 116 S.Ct. 1657 (1996) (the history of reasonable suspicion and probable cause in a suppression context indicates that those concepts should be reviewed de novo rather than for abuse of discretion).

In the instant case, the petitioner attempted to advance the video tape argument to the Michigan appellate courts. Even though the petitioner's trial attorney had not objected to the introduction of the video tape, the prosecution chose to address the issue on the merits in its brief to the Michigan Court of Appeals. That Court, however, sua sponte raised the waiver issue and reviewed the petitioner's arguments using a manifest injustice standard. The Court concluded that there was no manifest injustice. In the Motion for Rehearing, the petitioner argued that the Court had used the wrong standard because the prosecution had waived any claim of waiver by not invoking the waiver doctrine in its appellate brief. The petitioner thus argued that an abuse of discretion standard should have been used. The petitioner's rehearing motion was denied without comment. The argument was repeated to the Michigan Supreme Court which denied the petitioner's Application for Leave to Appeal, also without specific comment about the issues raised.

The standard of review used by the Michigan Court of Appeals in the petitioner's was arguably contrary to a prior decision of the Michigan Supreme Court, People v. Hamacher, 432 Mich 157, 438 N.W.2d 43 (1989). In Hamacher, the prosecutor invoked the waiver doctrine in its brief in the Michigan Supreme Court. The prosecutor argued that, even if the defendant's argument about marital privilege had substantive merit, the defendant had waived any trial objection to his wife's inculpatory statements because of a lack of timely objection. The Michigan Supreme Court noted that the waiver argument was advanced for the first time in the prosecutor's brief in the Michigan Supreme Court. Accordingly, the argument about waiver was itself deemed waived, and the issue was addressed on the merits using a less rigorous standard of review. The petitioner argued below, to no avail, that Hamacher should have been persuasive and that the standard of review issue should have been addressed.

Hamacher is consistent with the great weight of federal authority which also holds that a party who does not invoke a waiver argument in a timely fashion waives it. See, e.g., Fagan v. Washington, 942 F.2d 1155 (7th Cir. 1991); United States v. Doe, 53 F.3d 1081 (9th Cir. 1995); Ryan v. Royal Ins. Co., 916 F.2d 731 (1st Cir. 1990); United States v. Schlesinger, 49 F.3d 483 (9th Cir. 1995); Fox v. District of Columbia, 83 F.3d 1491 (D.C. Cir. 1996); Wilson v. Kelkhoff, 86 F.3d 1438 (7th Cir. 1996). Cf., Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (holding that waiver does not divest a court of jurisdiction it otherwise enjoys and also rejecting an argument raised for the first time in this Court).

In the instant case, the petitioner submits that the prosecutor waived any appellate objection based upon the failure to invoke the waiver argument in its appellate brief. Accordingly, the standard of review for the video tape issue

should have been abuse of discretion rather than manifest injustice. The petitioner believes that had the lesser and more favorable review standard been used, the outcome would have or at least should have been different. The petitioner thus submits that use of an erroneous standard of review with respect to the video tape issue, an issue with federal constitutional implications, is another reason why review by this Court is appropriate.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted so that the Court can decide the questions surrounding the use of an edited video tape.

Respectfully submitted,

/s/_____
David A. Dodge
*Counsel of Record*

DAVID A. DODGE, P.C.
200 N. Division Avenue
Grand Rapids, MI 49503
(616) 459-3850
Counsel for Petitioner

## APPENDIX A

**ORDER**
Entered: November 25, 1997

108128

PEOPLE OF THE STATE OF MICHIGAN,
*Plaintiff-Appellee,*

v.

SC:108128
COA:180763
LC: 93-002856-FC

JASON SCOTT ROOF,
*Defendant-Appellant.*

---

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley Michael F. Cavanagh Patricia 3. Boyle
Elizabeth A. Weaver Marilyn Kelly Clifford W. Taylor
Justices

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy, of the order entered at the direction of Court.

/s/_____
Jacqueline B. MacKinnon
Deputy Clerk

Dated: November 25, 1997

## APPENDIX B

**Court of Appeals, State of Michigan**

**ORDER**

People v Jason Scott Roof

Docket # 180763

L.C. # 93-002856-FC

---

Stephen J. Markman
Presiding Judge

Gary R. McDonald, Michael J. Matuzak
Judges

The Court orders that the motion for rehearing is **DENIED**.

A true copy entered and certified by Ella Williams, Chief Clerk, on

Date: December 10, 1996

/s/_____
Ella Williams
Chief Clerk

## APPENDIX C

## STATE OF MICHIGAN
## COURT OF APPEALS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, | ) | UNPUBLISHED |
| | ) | September 27, 1996 |
| v. | ) | No. 180763 |
| | ) | LC No. 93-2856-FC |
| JASON SCOTT ROOF, Defendant-Appellant. | ) | |

Before: Markman, P.J., and McDonald M. J. Matuzak,* JJ.

**PER CURIAM.**

Defendant appeals by right his jury conviction for first-degree murder, MCL 750.316; MSA 28.548. Defendant confessed to the stabbing homicide of the 21/2 year old son of an acquaintance and was charged with open murder. He was sentenced to the mandatory term of life imprisonment. We affirm.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

*People of the State of Michigan v. Roof*
No. 180763

Defendant first contends that the evidence presented at trial was insufficient to support his conviction, claiming that the jury improperly ignored his own testimony that his actions at the time of the killing were spontaneous and that he had no intent to kill. We disagree. Premeditation and deliberation may be inferred from the circumstances surrounding a killing, including the prior relationship by the parties and the defendant's actions leading up to, during, and after the killing. *People v Morris*, 202 Mich App 620, 622-623; 509 NW2d 865 (1993), vacated on other grounds 445 Mich 860 (1994). Evidence presented at trial revealed that defendant had a particular dislike of the victim and had repeatedly threatened to harm him; that defendant first tried to suffocate the victim with a pillow and, when suffocation did not work, retrieved a knife from across the room and stabbed the victim through the heart; that defendant put the victim in the back of his pickup truck even while the victim gasped for breath; and that defendant went to great lengths to methodically conceal what he had done, showing a decided lack of remorse upon confuting. Viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the evidence sufficient to prove the essential elements of the crime beyond a reasonable doubt. *People v Medlyn*, 215 Mich App 338, 340; NW2d __ (1996).

Defendant next contends that the trial court abused its discretion when it admitted into evidence an edited version of his videotaped interview with police, claiming that failure to present the entire tape was prejudicial. Since defendant failed to object to this admission below, we need not review this issue absent manifest injustice. *People v. King*, 210 Mich App 425, 432; 534 NW2d 534 (1995). We

find no manifest injustice because the prosecutor apprised the jury that the tape had been edited and the trial court admitted into evidence the omitted portions of the interview as well as the entire unedited tape.

Defendants next contends that the trial court improperly failed to instruct the jury on a controlling issue of the case when it did not give an instruction regarding the evidentiary weight to be given to his videotaped statement, claiming that this instruction pertained to his state of mind at the time of the killing. Since defendant failed to object to this omission below, we need not review this issue absent manifest injustice. *People v. Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). We find no manifest injustice because the trial court gave instructions on an explicitly directed the jury's attention to, the issue of defendant's state of mind at the time of the killing.

Defendant next contends that the trial court abused its discretion when it refused to allow him to call a pharmacological expert witness. We disagree. The proposed witness would have given testimony regarding side effects of defendant's drug regimen, facts that had already been introduced by a previous defense witness. Furthermore, these facts were never directly disputed by the prosecution. We find no abuse of discretion in disallowing the presentation of cumulative and undisputed evidence. *People v. Fortson*, 202 Mich App 13, 18; 507 NW2d 763 (1993); MRE 403.

Defendant next contends that the trial court improperly required defense counsel to declare his own witness hostile, claiming that his counsel instead should have been able to ask

leading questions pursuant to MRE 611(c)(3). We disagree. We note that defendant failed to object to the trial court's limitation on the manner of questioning and therefore, we need not review this issue absent manifest injustice. *People v. Adamski*, 198 Mich App 133, 143; 497 NW2d 546 (1993). Furthermore, at no time did the trial court require defense counsel to declare his witness hostile. Rather, the trial court merely admonished defense counsel, quite inconspicuously, that he would not be permitted to continue to lead his own witness. Moreover, we note that MRE 611(c)(3) requires that the witness be identified as hostile *when called* in order for leading questions to be appropriate, which was not the case here. We find no manifest injustice here.

Defendant next contends that the trial Court abused its discretion by allowing a defense witness to give expert testimony on cross-examination without prior qualification as an expert. We agree. Defendant called a mental health clinician as part of his case-in-chief; however, the witness was not offered as an expert. On cross-examination the trial court permitted the witness to testify that defendant was not mentally ill. Such a specialized opinion by a lay witness cannot be rationally based on the witness' perception, MRE 701, and the trial court abused its discretion when it allowed the witness to so testify. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 553 (1995). However, we also find that the trial court's error was harmless, precluding reversal, since there was no miscarriage of justice. Substantial evidence had already been introduced establishing an absence of mental illness on defendant's part.

Finally, defendant contends that he was denied the

effective assistance of counsel at trial, claiming that his counsel erred by calling certain witnesses part of whose testimony undermined his own case. We disagree. We note that defendant offers no concrete evidence to support his assertions that his trial counsel was ineffective. Furthermore, it is to be expected, in the normal course, that the cross-examination of defense witnesses will often elicit some testimony that is unhelpful to the defense's theory of the case. Defendant has not overcome the presumption that his counsel's actions constituted reasonable trial strategy, nor has he shown in some other way that his counsel's performance fell below an objective standard of reasonableness so as to deprive him of a fair trial. *People v. LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v. Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Because we find only one error and conclude that it was harmless, we need not address defendant's contention that cumulative error denied him a fair trial.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Michael J. Matuzak

## APPENDIX D

**STATE OF MICHIGAN**
**31ST CIRCUIT COURT**

**JUDGMENT OF SENTENCE**
**COMMITMENT TO CORRECTIONS DEPARTMENT**

**CASE NO. 93-002856-FC-O**

Approved, SCAO

ORI 740015J
COURT ADDRESS
201 MC MORRAN BOULEVARD
PORT HURON, MI 48060
COURT TELEPHONE NO.
810-9852031

THE PEOPLE OF STATE OF MICHIGAN

v.

Defendant
ROOF, JASON, SCOTT
1512 NORTH RIVER RD APT 7
ST CLAIR, MI 48079

CTN:749300266801
DOB: 3/27/69

*JUDGMENT OF SENTENCE*
No. 93-002856-FC-0

Prosecuting attorney name:
BROWN, ELWOOD,
Bar No. 30069

Defendant attorney name:
FORSYTH, FRANK J,
Bar No. 31736

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 6/29/94 of the crime(s) as stated below:

X HOMIC MURDER 1ST DEG PREM 750.316-A

2. The conviction is reportable to Secretary of State under MCL 257.732 or MCL 281.1040. The defendant's driver license number is: R100373760244

3. HIV testing was ordered on _____. Confidential test results attached.

IT IS ORDERED:
4. Defendant is sentenced to the custody of the Michigan Department of Corrections. This sentence shall be executed immediately.

SENTENCE DATE: 8/29/94
MINIMUM YEAR: LIFE
MAXIMUM YEAR: LIFE
DATE SENTENCE BEGINS: 8/29/94
OTHER INFORMATION: LIFE SENTENCE

*JUDGMENT OF SENTENCE*
No. 93-002856-FC-0

Defendant shall pay restitution of ____.

5. Sentence(s) to be served consecutively to:
__ each other. _____ case numbers

6. Defendant shall pay a ____ assessment for the Crime Victim Rights Fund.

7. Court recommendation:
_____
_____

Date: August 29, 1994 Judge: Ernest F. Oppliger
Bar No: 18513

PAGE 2

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

CC 21913 (6/93)

Deputy court clerk

## APPENDIX E

## APPENDIX

### SUMMARY OF OMISSIONS FROM VIDEO-TAPED, POST-ARREST INTERVIEW OF JASON ROOF

This summary was prepared by comparing People's Exhibit 38, the unedited version of Roof's post-arrest interview, and People's Exhibit 39, the edited version. Both exhibits were entered into evidence, but only Exhibit 39 was played to the jury. (Vol. 3, pp. 350-351; and 352-381). The comparison was aided by the fact that a clock was positioned directly over Roof's head. The comparative times on that clock documented the duration of the People's redaction of the tape.

### SUMMARY

The issue at trial was not guilt or innocence, but rather whether Roof should be convicted of first degree premeditated murder or some lesser crime. Central to the defense's theory was evidence that Roof was taking mind-altering, psychotropic medicine and further that Roof suffered from some type of mental problem which affected his ability to form the intent necessary for first degree murder.

The redactions from the tape were prejudicial to Roof because the omitted evidence went, in large part, to Roof's mental instability, his anger, his violent tendencies, his attempt to seek help, and his use of medication in an attempt to control those problems.

*SUMMARY OF OMISSIONS FROM VIDEO-TAPED, POST-ARREST INTERVIEW OF JASON ROOF*

The redactions were further prejudicial because the jury was deprived of information that would have allowed it to contextualize Roof's otherwise cold and seemingly heartless recitation of the events surrounding the murder.

In sum, the prosecutor's tape focused on the actus res or the crime itself. The redacted portions of the tape focused on Roof's mens rea, which was really the sole defense issue at trial.

## 1. OMITTED SEGMENTS ONE AND TWO

The first two omitted segments were approximately one minute in length each, occurring at about 5:30 AM. During those segments, Roof talked about various complaints that he had and about his military service in Hawaii and at Fort Benning, Georgia.

## 2. OMITTED SEGMENT THREE

The next omission was approximately a ten minute segment, occurring at about 5:34 AM. During that segment, Roof talked about a pending but unrelated criminal charge, denied his involvement with that crime, and talked about his anger and the impact of the medication he has been taking. Roof talked about his hope that this incident will not cause him to lose his driver's license and his ability to drive an over the road truck. This passage is important because it indicates the degree to which Roof was out of touch with reality shortly after the crime had been committed.

Roof further talked about meetings with his counselor

and psychiatrist, the fact that he had been taking four different types of medication, and the fact that he had been diagnosed with an intermittent explosive personality disorder.

Roof talked about his efforts to obtain psychiatric help while he was in the military and complained that no one would help him. He discussed the conflicts that he had experienced with family members after his return from the service in that those family members were "on his ass" about getting a job and moving along with life.

### 3. OMITTED SEGMENT 4

The next segment was approximately 4 minutes in length, occurring at about 5:45 AM. Roof indicated that he didn't know where he stood in the world. He described his moods and how rapidly they changed. He described his anger and how he became destructive during his periods of anger. He again described his medication and his conflict with his grandmother about how was conducting his life. to be told what to do. Roof further expressed that he did not like to be told what to do.

### 4.OMITTED SEGMENT 5

The next segment was approximately 7 minutes in length. occurring at about 6:03 AM. It came after Roof had described the specifics of the murder. Roof filled out forms to consent to the search his apartment and truck. thus demonstrating his attempts to cooperate with the authorities.

*SUMMARY OF OMISSIONS FROM VIDEO-TAPED, POST-ARREST INTERVIEW OF JASON ROOF*

**5. OMITTED SEGMENT 6**

Roof ranted and raved about how badly people had treated him. This omission is approximately 2 minutes in length, occurring at about 6:11 AM.

**6. OMITTED SEGMENTS 7 AND 8**

In an approximate 5 minute omitted segment occurring at about 6:14 AM, Roof talked about how he can't figure out what is wrong with him, why he can't get along with people, why he can't find a decent girl friend, and other factors which had been the source of on-going frustration. The next segment is approximately 1 minute in length, occurring at about 6:19 AM and continues Roof's complaints about his troubles with women.

**7. OMITTED SEGMENT 9**

The next segment is approximately 10 minutes in length, occurring at approximately 6:24 AM. Roof spoke about his experimentation with drugs, about his stress and anger, his sudden explosions, and his problems in the military including fights. He described his alcohol usage and stated that he had used alcohol last night prior to the incident. This omission is important because it contradicts Johnston's prior testimony and also because Klonopin's potential side-effects are exacerbated by alcohol.

**8. OMITTED SEGMENT 10**

The final omitted segment, approximately 20 minutes

in length, involved Roof writing out a statement which he signed. The segment also included a reference to his drug dosage and to the fact that he had taken medication only a few hours prior to the incident.

## APPENDIX F

**STATE OF MICHIGAN**

**IN THE COURT OF APPEALS**

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee | ) | Court of Appeals No. 180763 |
| v. | ) | Lower Court No. 093-002856-FC |
| JASON SCOTT ROOF, Defendant-Appellant | ) | |

/

**REVISED MOTION FOR REHEARING**

NOW COMES the Defendant-Appellant, Jason Scott Roof, by and through his Attorney, DAVID A. DODGE, P.C.,and, pursuant to MCR 7.216(H) moves this Honorable Court to grant a rehearing of its Opinion and Order dated September 27, 1996. In support of this Motion, appellant states as follows:

1. Appellant was convicted of first degree murder, in violation of MCL 750.316, and he was sentenced to a mandatory term of life imprisonment.

2. This Court affirmed the appellant's conviction in an unpublished per curiam opinion, dated September 27, 1996. A copy of that opinion is attached to this Motion.

3. Roof timely moved for rehearing. By letter dated October 28, 1996, this Court directed Roof to file a revised pleading that complied with the page limitations of MCR 7.215(G)(1). This revised motion is in response to that Order and is filed within the time limitations mandated by the Court.

4. Roof seeks rehearing on the following issues. (Roof is not waiving other issues for purposes of subsequent review.)

**A. Whether the Court erred by using the manifest injustice standard of review on the video tape issue when the prosecutor did not argue waiver in its appellate brief.** One of the appellate issues focused on the prosecutor's use of a redacted version of a video tape of defendant's post-arrest statement to the authorities. The prosecutor did not argue waiver in its appellate brief and addressed this claim on its merits. This Court used a manifest injustice standard of review because Roof's then attorney did not object during trial. Roof believes that this standard of review was error.

In People v. Hamacher, 432 Mich 157, 438 N.W.2d 43 (1989), the defendant, charged with murder, made an inculpatory statement to his wife. The inculpatory statement was admitted without objection at both the preliminary examination and at trial. The defendant did not object to the admission of the inculpatory statement at the preliminary examination. At trial, a new attorney objected to the admission to the statement, but the prosecutor persuaded the trial judge to admit the statement on grounds other than waiver. On appeal, the defendant challenged the admission of the statement, arguing that it was privileged because of the

confidential communications privilege. The prosecutor did not argue waiver in its appellate brief. The Court of Appeals initially affirmed the conviction, but then reversed after the Michigan Supreme Court vacated the judgment and remanded for further consideration of the communications privilege. On appeal to the Supreme Court, the prosecutor raised the waiver argument for the first time in its Supreme Court brief. The Supreme Court rejected the waiver argument, holding that the prosecutor's failure to argue waiver was itself a waiver, thus allowing the appellate court to review the issue on its merits. 432 Mich at pp. 167-168.

Hamacher's holding on waiver is consistent with decisions of both the United States Supreme Court and numerous federal appellate courts. For example, in Oklahoma City v. Tuttle, 471 U.S. 808 (1985), the petitioner argued that the respondent's jury instruction argument had been waived because the respondent's objection to the instruction at issue was not sufficiently specific. The Supreme Court rejected the petitioner's claim and reached the merits without elevating the respondent's burden of persuasion. Specifically, the Court held that a waiver does not divest an appellate court of jurisdiction to consider an issue on the merits. In Tuttle, the petitioner did not argue waiver until oral argument. That was too late. The Court held that waiver arguments should be called to the attention of the reviewing court no later than the proponent's first brief. See, also, on Lee v. United States, 343 U.S. 747 (1952) (holding that even though issue was not raised by the appellant at the trial court level, the Supreme Court would reach the merits in the absence of any timely objection on waiver grounds). See, also, United States v. Doe, 53 F.3d 1081 (9th Cir. 1995);

Fagan v. Washington, 942 F.2d 1155 (7th Cir. 1991); United States v. Caputo, 978 F.2d 972 (7th Cir. 1992); United States v. Menesses, 962 F.2d 420 (5th Cir. 1992); United States v. Quiroz, 22 F.3d 489 (2d Cir. 1994); In re: San Juan Dupont Plaza Hotel Fire Litigation, 45 F.3d 569 (lst Cir. 1995); Fox v. District of Columbia, 83 F.3d 1491 (D.C. Cir. 1996). It should also be noted that in the instant case, the prosecutor argued waiver with respect to the jury instruction issue. However no such argument was made with respect to the video tape issue. This fact supports the inference that the prosecutor's decision to address the video tape issue on the merits was a conscious choice to which the prosecutor should be now held.

For all of these reasons, this Court erred when it used the manifest injustice standard and rehearing should be granted using the abuse of discretion standard.

**B. Alternatively, the abuse of discretion standard of review should have been used with respect to the video tape argument because an outcome-determinative constitutional issue was involved.** The manifest injustice standard of review should not be invoked when the error was of constitutional dimension and when it was potentially decisive to the case's outcome. See, e.g., People v. Grant, 445 Mich 535 (1994).

A defendant whose liberty is at stake is entitled to due process protections with respect to an alleged confession. See, e.g., People v. Young, 212 Mich App 630, 538 N.W.2d 456 (1995); People v. Wright, 441 Mich 140, 490 N.W.2d 351 (1992); 1963 Const., Art. 1, Sect. 17. Roof's due process

rights were violated because there were no procedural safeguards to assure that the editing process was free from abuse and to further assure that the prosecutorial version accurately and reliably portrayed the dynamics of the interview. Without such safeguards, the prosecutor had unbridled discretion to edit the video taped events in a manner which unduly favored the prosecution.

The video taped confession was also outcome-determinative. The issue at trial was whether Roof should be convicted of premeditated murder or some lesser offense. It is submitted that the edited version of the video tape strongly supported the prosecutor's argument about state of mind, while the unredacted version undercut a finding of premeditation. The jury never saw the unedited version, and, indeed, re-played the prosecutor's version during deliberations.

The constitutional issue thus mandated an abuse of discretion review, and this Honorable Court should rehear the case using the lesser standard.

**C. As to the redacted video tape issue, an abuse of discretion of review Would have resulted in a reversal rather than an affirmance of Roof's conviction**. The centerpiece of the prosecution's case was an edited video tape of Roof's post-arrest statement. Roof believed that the trial court abused its discretion in at least three different ways when it admitted the edited tape and that when these errors are viewed individually or cumulatively, they resulted in an unfair trial and a miscarriage of justice. MCL 769.26; People v. Malone, 180 Mich App 347 (1989) (permitting a totality

analysis).

At the threshold, a voluntary confession or admission is not conclusive evidence of guilt. A defendant is entitled to introduce evidence Which familiarizes the jury with the circumstances surrounding the confession, including the defendant's mental state when the crime was committed and when the confession was given. See, e.g., People v. Hamilton, 163 Mich App 661, 415 N.W.2d 653 (1987); People v. Gilbert, 55 Mich App 168, 222 N.W.2d 305 (1974); Lego v. Twomey, 404 U.S. 477 (1971). Moreover, a defendant who chooses to be tried by a jury has a right to a fair and impartial trial. See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968); People v. Miller, 411 Mich 321, 307 N.W.2d 335 (1981). Here, it is contended that both principles were violated because the prosecutor was allowed to "stack the deck" by structuring critical evidence in a fashion more favorable to the prosecution and detrimental to Roof's case.

As to the specifics, the first abuse of discretion occurred when the trial judge allowed the prosecutor to play the edited tape during its case in chief. Roof has found no authority for such a procedure, and further, the prosecution itself has never cited any affirmative authority for its procedure. To the contrary is MRE 1002 which requires that the original of any recording be used unless otherwise authorized by rule of statute. The purpose of this rule is to assure that the jury is shown an accurate recording and that no errors are made in copying. See, e.g., Sauget v. Johnston, 315 F.2d 816 (8th Cir. 1963) (making such a ruling on FRE 1002, a substantially identical rule to Michigan's MRE 1002). Here, the original tape was available, and it should have been

used as opposed to the edited copy.

MRE 1003 is also authority against the procedure. Under that rule a duplicate cannot be used if "it would be unfair to introduce the duplicate in lieu of the original". The cases located by Roof indicate that Michigan allows the admission of duplicates or copies only if the entire original is introduced. See, e.g., Peeples v. City of Detroit, 99 Mich App 285, 297 N.W.2d 839 (1980); Joba Construct. Co., Inc. v. Burns & Roe, 121 Mich App 615, 329 N.W.2d 760 (1982). Here, the version admitted was not the original. Moreover, the prejudice to Roof was enormous since the prosecutor's version portrayed Roof as a callous and cold-hearted individual who had killed a young child without remorse. Additionally, the version was unfair because it only presented the version the prosecutor wanted the jury to see. The jury was denied its right to see evidence chronologically, to review it, and to sort through it on its own. In this regard, this Court's attention is also directed to a line of cases which holds that if a statement is presented to the jury, the jury is entitled to hear the entire statement without redaction or editing [People v. McElheny, 221 Mich 50 (1922); People v. Taylor, 98 Mich App 685 (1980); People v. Warren, 65 Mich App 1977 (1975); People v. Hopper, 21 Mich App 276 (1970); Gillespie, Michigan Criminal Law and Procedure, 2d Ed., Sect. 465, p. 545 (stating rule and collecting cases)] and to a line of cases dealing with chain of custody and the need to ensure that evidence is presented in its original form without alteration. See, e.g., People v. White, 208 Mich App 126, 527 N.W.2d 34 (1994). All of these factors indicate that it was an abuse of discretion to admit the redacted tape.

As argued supra, a second abuse of discretion occurred because of the lack of procedural safeguards in the editing process and a corresponding violation of Roof's due process rights. A third abuse of discretion occurred when the jury was allowed to listen to the prosecutor's version a second time. Such a decision was prejudicial because it all but guaranteed the verdict. For all of these reasons, Roof requests rehearing.

**D. Sufficiency of Evidence**. Roof respectfully asks this Court to reconsider its holding on sufficiency by focusing greater attention on Roof's use of psychotropic drugs and the corresponding impact of those drugs upon Roof's state of mind at the time that the crime was committed.

At the threshold, Roof asks this Court to consider a line of recent cases decided by the Illinois Supreme Court holding that the use of psychotropic drugs creates bona-fide doubts about sanity and further holding that fitness hearings should be held to determine whether a defendant using such drugs is competent to stand trial. See, e.g. People v. Gevas, 166 Ill. 2d 461 (1995); People v. Kincaid, 168 Ill. 2d 394 (1995); People v. Brandon, 162 Ill. 2d 450 (1994). While these cases are not binding upon this Court, they suggest the need to seriously consider the impact of psychotropic drugs in the sufficiency analysis.

In this case, the People conceded that Roof was using psychotropic drugs both before and at the time of the incident. The People also conceded that the psychotropic drugs had potentially serious side effects, including psychotic episodes.

The evidence also showed that Roof exhibited severe

mood swings and that these swings led to episodes which were often violent and uncontrollable. While the evidence showed that Roof had expressed his dislike for the victim on several occasions, the evidence also showed that no one took Roof seriously. Additional evidence indicated that Roof had displayed no hostility to the victim on the day of the murder even though he was in the company of the victim and the victim's mother the entire day. The only specific and detailed evidence about the actual murder came from Roof's post-trial statement. That statement indicated that Roof experienced a sudden mood change and that Roof used a knife which was usually present in his bedroom to commit the crime. The evidence also showed that the victim's mother was present during the crime and that Roof's attempts to conceal the crime were clumsy and unlikely to succeed.

Premeditation and deliberation require prior thought and an evaluation of choices. See, e.g., People v. Motrin, 31 Mich App 301 (1971); People v. Johnson, 99 Mich App 547 (1980). Roof respectfully submits that if serious consideration had been given to the psychotropic drug evidence, it would have been clear that Roof acted on a drug-induced impulse, that Roof did not plan the crime, and that he did not deliberate about either the crime or its consequences.

Since the only issue in the trial was whether Roof was guilty of premeditated murder or some lesser crime, a reconsideration of the sufficiency argument against the background of Roof's medication warrants a rehearing.

**E. Totality**. This Court found that one error occurred when a lay person was allowed to testify as an expert. Roof

alternatively asks this Court to use a cumulative or totality analysis and to conclude that that error plus the errors discussed in this motion justify rehearing and relief. See, e.g., People v. Malone, 180 Mich App 347 (1980); People v. Rosales, 160 Mich App 304(1987).

## CONCLUSION

For all of the reasons stated, Roof respectfully moves this Court to rehear the case and, upon reflection, to vacate his conviction and remand for further proceedings.

Grand Rapids, MI
November 4, 1996

Respectfully submitted,

/S/_____
DAVID A. DODGE
DAVID A. DODGE, P.C.
200 N. Division Avenue
Grand Rapids, MI 49503
(616) 459-3850

## APPENDIX G

## FEDERAL AND STATE CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> No person shall be...deprived of life, liberty, or property without due process of law

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> No State shall make or enforce any law which shall ...deprive any person of life, liberty, property, without due process of law.

1963 Constitution, Art. 1, Sect. 17 (Michigan)

> No person shall...be deprived of life, liberty, or property without due process of law

## MICHIGAN COURT RULES

### MICHIGAN RULES OF EVIDENCE: MRE 1001(4). DUPLICATE

A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques, which accurately reproduces the original.

### MICHIGAN RULES OF EVIDENCE: MRE 1002. REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

### MICHIGAN RULES OF EVIDENCE: MRE 1003. ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

## APPENDIX H

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Circuit Court of St. Clair County
The Honorable Ernest F. Oppliger, Circuit Judge

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF MICHIGAN, | ) | Supreme Court No. _____ |
| Plaintiff-Appellee, | ) | Court of Appeals No. 180763 |
| v. | ) | |
| JASON SCOTT ROOF, | ) | St. Clair County Circuit Court No. 093-002856-FC |
| Defendant-Appellant | ) | |

_____/

ST. CLAIR COUNTY PROSECUTOR
County Bldg.
201 McMorran Blvd.
Port Huron, MI 48060
(810) 985-2400

---

DAVID A. DODGE (P22906)
DAVID A. DODGE, P.C.
Counsel for Defendant-Appellant
200 North Division Avenue
Grand Rapids, MI 49503
(616) 459-3850

*The People of The State of Michigan v. Roof*
Court of Appeals No. 180763

**APPLICATION FOR LEAVE TO APPEAL**

**NOTICE OF HEARING**

**PROOF OF SERVICE**

## TABLE OF CONTENTS


Index of Authorities . . . . . ii

Statement of Questions Involved . . . . . x

Judgment Appealed from and
Relief Sought . . . . . 1

Grounds for Application . . . . . 1

Concise Statement of Material
Proceedings and Facts . . . . . 2

A. Charge, Conviction, and Sentence . . . . . 2
B. Post-Conviction Proceedings . . . . . 14
C. Instant Application . . . . . 14

Law and Argument . . . . . 17

Summary of Argument . . . . . 17

I. LEAVE SHOULD BE GRANTED SO THAT THIS COURT CAN CONSIDER WHAT STANDARD OF REVIEW SHOULD BE USED WHEN AN APPELLANT FAILS TO PRESERVE AN ERROR BY OBJECTION BUT WHERE THE PEOPLE DO NOT ASSERT WAIVER AND INSTEAD ADDRESS THE CLAIMS ON THE MERITS. . . . . 19

II. LEAVE SHOULD BE GRANTED TO CONSIDER THE PROPRIETY OF THE PROSECUTOR'S USE OF AN EDITED VERSION OF A VIDEO TAPED POST-ARREST INTERVIEW WITH THE DEFENDANT AS PART OF ITS CASE IN CHIEF. . . . . 26



III. LEAVE SHOULD BE GRANTED TO CORRECT AN UNJUST RESULT IN THAT THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION AND/OR DELIBERATION TO WARRANT A CONVICTION FOR FIRST DEGREE MURDER . . . . . 48

IV. LEAVE SHOULD BE GRANTED BECAUSE THE OTHER ISSUES PRESENTED BY THE APPELLANT WARRANT RELIEF . . . . . 52

A. ERROR OCCURRED WHEN MICHIGAN JURY INSTRUCTION CJI2D 4.1, DEALING WITH THE USE OF DEFENDANT'S OUT OF COURT STATEMENTS, WAS NOT GIVEN . . . . . 52

B. ERROR OCCURRED WHEN THE TRIAL COURT REFUSED TO ALLOW DEFENDANT TO PRESENT A SURREBUTTAL WITNESS TO RESPOND TO TESTIMONY GIVEN BY THE PEOPLE'S REBUTTAL, EXPERT WITNESS . . . . . 53

C. ERROR OCCURRED WHEN THE TRIAL COURT INTERRUPTED AND INTERFERED WITH THE APPELLANT'S TRIAL ATTORNEY'S EFFORTS TO IMPEACH HIS OWN EXPERT WITNESS . . . . . 54

D. ERROR OCCURRED WHEN THE COURT OF APPEALS DID NOT REMAND FOR A GINTHER HEARING TO DEVELOP THE RECORD ON AN APPELLATE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE . . . . . 55

V. LEAVE SHOULD BE GRANTED TO CONSIDER WHETHER A TOTALITY OF THE ERRORS ALLEGED WARRANT RELIEF EVEN IF THIS COURT CONCLUDES THAT THE ERRORS CONSIDERED INDIVIDUALLY DO NOT REQUIRE REVERSAL . . . . . 55

Relief . . . . . 57

[p. ii]

* * *

Other seminal principles also justify relief. For example, it is axiomatic in Michigan that a confession is not conclusive evidence of guilt. A defendant is entitled to present evidence about his mental state and other factors. The edited tape was error because it deleted evidence material to the appellant's mental state. Additionally, it has long been the rule in Michigan that if any statement is given to the jury, the jury is entitled to hear the entire statement. The procedures used in this case violated that rule. Finally, a defendant is entitled to a fair and impartial trial. Here, the appellant was denied that right because the prosecutor was allowed to stack the deck by presenting a video tape which only showed those portions of the interview favorable to the prosecution.

Because the video tape was outcome determinative, any standard of appellate review would warrant relief.

I. LEAVE SHOULD BE GRANTED SO THAT THIS COURT CAN CONSIDER WHAT STANDARD OF

*The People of The State of Michigan v. Roof*
Court of Appeals No. 180763

REVIEW SHOULD BE USED WHEN AN APPELLANT FAILS TO PRESERVE AN ERROR BY OBJECTION BUT WHERE THE PEOPLE DO NOT ASSERT WAIVER AND INSTEAD ADDRESS THE CLAIMS ON THE MERITS.

The Court of Appeals concluded that three of the issues raised by the appellant were waived because the appellant did not preserve those issues by proper objection to the trial court. (Slip. Op. at p. 2). Those issues related to the admission of an edited version of defendant's video-taped confession, to the trial court's failure to give a jury instruction about the evidentiary weight to be given to a statement by the defendant, and to the trial court's decision to limit the type of questions being asked of a defense witness. Id.

[p. 19]

As to the jury instruction issue, the appellant's opening brief conceded that trial counsel had not requested that CJI2d 4.1, entitled "Defendant's Statements as Evidence Against the Defendant", be given. (App. Open. Br. at pp. 16-1 7). That brief further conceded that the standard of review should be for manifest injustice. (App. Open. Br. at p. 17).

The People's brief accepted that concession and also couched its argument in terms of manifest injustice. (Peo. Br. at pp. 11-13).

As to the other two issues, the appellant did not concede that the standard of review should be manifest injustice. Rather, the appellant argued, in effect, that the trial court had abused its discretion and had therefore denied the defendant a fair trial. (App. Open. Br. at pp. 13-15 and 24-

25).

The People's brief to the Court of Appeals did not argue that the appellant had waived these issues and instead addressed the issues on their merits. (Peo. Br. at pp. 9-10 and 17-1 8).

The appellant argued in its Motion for Rehearing that the prosecutor's failure to argue waiver waived the waiver. Appellant further argued that the prosecutor's decision to address the issues on the merits was an affirmative act which also indicated waiver.

This Honorable Court addressed the prosecutor's obligation to timely bring a possible waiver of an issue to the attention of the appellate court in People v. Hamacher, 432 Mich 157, 438 N.W.2d 43 (1 989). In Hamacher, the defendant was charged with murder. The defendant had made an inculpatory statement

[p. 20]

to his wife. The defendant and his wife were married at the time that the statement was made, but they were in the process of divorce at the time of trial. The wife's testimony about the inculpatory statement was admitted both at the preliminary examination and at trial.

On appeal, the prosecutor argued that the husband had waived any trial objection to his wife's testimony because he had not objected to that testimony at the preliminary examination. This Court rejected that argument and held that the prosecutor had waived the waiver argument because the prosecutor had not raised the waiver issue either at the trial

court level or in various briefs submitted to the Court of Appeals. In fact, the waiver issue first surfaced when the prosecutor filed his brief in this Court. The reversal of the defendant's conviction by the Court of Appeals was then affirmed because the wife's testimony had been improperly admitted at trial.

Numerous federal cases agree with this Court's reasoning in Hamacher and also hold that the prosecutor waives a defendant's waiver by not timely calling that alleged waiver to the attention of the appellate court. Waiver is alternatively demonstrated when the prosecutor addresses the allegedly waived issue on the merits.

For example, in Oklahoma City v. Tuttle, 471 U.S. 808 (1985), the petitioner argued that the respondent's jury instruction argument had been waived because the respondent's objection to the instruction at issue was not sufficiently specific. The Supreme Court rejected the petitioner's claim and reached the merits without

[p. 22]

elevating the respondent's burden of persuasion. Specifically, the Court held that a waiver does not divest an appellate court of jurisdiction to consider an issue on the merits. In Tuttle, the petitioner did not argue waiver until oral argument. That was too late. The Court held that waiver arguments should be called to the attention of the reviewing court no later than the proponent's first brief. See, also, On Lee v. United States, 343 U.S. 747 (1952) (holding that even though issue was not raised by the appellant at the trial court level, the Supreme Court would reach the merits in the absence of any timely objection on waiver grounds).

Numerous federal appellate decisions have also adopted the "waiving the waiver" rule and have held that the government does not get the benefit of the alleged waiver unless a timely waiver argument is made. See, e.g., United States v. Doe, 53 F.3d 1081 (9th Cir. 1995); Fagan v. Washington, 942 F.2d 1155 (7th Cir. 1 991); United States v. Caputo, 978 F.2d 972 (7th Cir. 1 992); United States v. Menesses, 962 F.2d 420 (5th Cir. 1992); United States v. Quiroz, 22 F.3d 489 (2d Cir. 1994); In re: San Juan Dupont Plaza Hotel Fire Litigation, 45 F.3d 569 (1st Cir. 1995); Fox v. District of Columbia, 83 F.3d 1491 (D.C. Cir. 1996).

Appellant believes that these precedents are correctly decided. Each party in a criminal litigation has an obligation to bring its arguments to the attention of the Court. The theory of the waiver rule as it applies to defendants is that the defendant has an obligation to call his or her arguments to the attention of the trial or appellate courts at the first possible opportunity. When the waiver rule is invoked, the defendant is being penalized for the failure to give the appropriate

[p. 22]

court an opportunity to timely address the potential error.

Similarly, the prosecution has an obligation to alert the trial or appellate court to its arguments at its first possible opportunity. There is no principled reason why a defendant and a prosecutor should be treated differently. Accordingly, the prosecutor's actions should also give rise to a potential waiver, and if both parties waive, the reviewing court can and should address the issue as if no waiver at all had occurred.

Accordingly, the appellant submits that the Court of

Appeals erred when it invoked the waiver rule and reviewed the appellant's arguments using a manifest injustice standard of review. The Court of Appeals cited People v. King, 210 Mich App 425, 534 N.W.2d 534 (1995) in support of the "manifest injustice" standard of review. The panel did not cite this Court's recent decision in People v. Grant, 445 Mich 535, 520 N.W.2d 123 (1994), discussed infra, and it did not consider whether the errors were either constitutional or non-constitutional or whether any of the errors were outcome-decisive.[5]

The standard of review issue has been the subject of much recent debate.

[p. 23]

Approximately two years ago, this Court decided People v. Grant, 445 Mich 535, 520 N.W.2d 123 (1994). As part of the analysis, this Court noted long standing Michigan authority to the effect that a reviewing court can consider a constitutional error which could have been decisive of the outcome even if that error was not preserved by proper objection. 445 Mich at 547, citing cases.

---

[5] In King, the defendant argued that error had occurred because the jury was allowed to view the crime scene without any cautionary instructions about being mindful about changes that had occurred in that scene between the crime and the observation date. The defendant, however, had not requested a cautionary instruction, and the King panel cited a 1975 case, People v. Phillips, 61 Mich App 138, 232 N.W.2d 333 (1975) which stated the pre-Grant formulation for non-constitutional errors. (The defendant in Phillis argued that prosecutor made a "prejudicially erroneous" statement during closing argument.)

The primary focus of Grant, however, was the standard of review that should be used with respect to unpreserved non-constitutional errors. Drawing heavily on United States v. Olano, 113 S.Ct. 1770 (1993), this Court concluded that even an unpreserved non-constitutional error can be considered on appeal if that error was decisive of the outcome or among those kinds of errors that mandate automatic reversal. 445 Mich at pp. 552-553. In Grant, the trial court failed to give a jury instruction which was required by statute. This was error, but there was no objection, and, accordingly, the error was unpreserved.

This Court ultimately concluded that no relief was warranted because other trial events guided the jury with respect to the issue raised by the missing instruction and, thus, the mistake was not decisive of the outcome.

Since Grant, various panels of the Court of Appeals had wrestled with its meaning on a number of occasions. See, e.g., People v. Zinn, 217 Mich App 340, 551 N.W.2d 704 (1 996); People v. Sardy, 216 Mich App 111, 544 N.W.2d 23 (1996); In re Hildebrandt, 216 Mich App 384, 548 N.W.2d 725 (1 996); People v. Johnson, 215 Mich App 658, 547 N.W.2d 65 (1996); People v. Jacques, 215 Mich App 699, 547 N.W.2d 349 (1996); People v. Lugo, 214 Mich App 699,

[p. 24]

542 N.W.2d 921 (1 995); People v. Jackson, 213 Mich App 245, 539 N.W.2d 758 (1995); People v. Lee, 212 Mich App 228, 537 N.W.2d 233 (1 995); People v. Miller, 211 Mich App 30, 535 N.W.2d 518 (1995).

This Court also recently reaffirmed Grant's analysis in

People v. Figgures, 451 Mich 390, 547 N.W.2d 673 (1996). In Figgures, the defendant testified that he and his wife were reconciling and that they had lived together as husband and wife from time to time. Defendant also denied that he had been harassing his wife. The prosecutor was allowed to introduce evidence which rebutted defendant's claims in these two respects. The majority opinion concluded that it was not error to allow this rebuttal. The majority went on to state that even if the rebuttal testimony was erroneously admitted, relief was not warranted because the error was not outcome-decisive. The defendant admitted that he had broken into his wife's home, and that admission was corroborated by other witnesses. Because the other evidence was overwhelming, any error did not affect the trial's result.

A review of these cases indicates the importance of continued guidance on the standard of review to be employed. Indeed, the instant case is an example of the need for such guidance in that Roof's panel did not make a Grant analysis when it reached its decision about the appropriate standard of appellate review.

Another reason justifying review by this Court is the opportunity to harmonize Grant and Hamacher and to address the continued vitality of Hamacher following Grant. Appellant believes that the two cases can be harmonized by holding that Hamacher is an exception to Grant and that, as a result, it is



not necessary to make the "outcome-decisive" analysis unless the prosecutor makes a waiver argument.

For these reasons, appellant respectfully asks this

Court to grant leave to appeal and to ultimately conclude that the People waived any waiver argument unless the defendant's alleged waiver of an appealable issue is called to the attention of the reviewing court at the People's earliest opportunity.

## II. THIS COURT SHOULD GRANT LEAVE TO CONSIDER THE PROPRIETY OF THE PROSECUTOR'S USE OF AN EDITED VERSION OF A VIDEO TAPED POST-ARREST INTERVIEW WITH THE DEFENDANT AS PART OF ITS CASE IN CHIEF.

### 1. The Facts

The centerpiece of the prosecution's case was a video tape of an interview which was conducted with the appellant several hours after the victim was killed. The interview took place at the police station and was conducted by a detective with the St. Clair County Sheriff's Department.

The interview itself was approximately two hours in length. Exhibit 38 was the original video tape. It was introduced as evidence, but it was never played for the jury. When the prosecutor proposed the introduction of Exhibit 38, he laid a foundation by representing through testimony that the video was the original tape of the interview, that the detective had personally removed the tape from a camcorder which was located in the detective's office, that the detective had marked the tape with a property tag, that the detective had reviewed the tape in its

entirety on June 22, 1994[6], and that the detective had initialed the tape as being the same tape which the detective had had in his possession in 1 993. The tape was admitted by stipulation. (TR, Vol. 3, p. 350).

By contrast, Exhibit 39 was characterized as an edited version of the original tape. As to this tape, the following representations were made through the testimony of Detective LaRue. (TR, Vol. 3, p. 351):

A. The original video was "condensed down" and/or "edited" to produce Exhibit 39;

B. The video was allegedly edited to focus upon events of the evening of the killing;

C. The editing process was "done by your office";

D. Detective LaRue had reviewed the edited video tape in its entirety and had initialed it[7];

E. Detective LaRue described Exhibit 39 as a "composite of the original tape and edited version of the original tape";[8] and

---

[6] The tape was offered in evidence on June 23, 1994, during the testimony of Detective Richard LaRue.

[7] The date of this review was not part of the record.

[8] This phraseology suggests that there were multiple edits.

F. The edited tape had darkened spots which indicated where the editing had taken place.

The People offered Exhibit 39 into evidence and the defense did not object.

[p. 27]

The Exhibit was then played for the jury. During deliberations, the jury asked to see the edited tape again, and Exhibit 39 was played for the jury a second time.

At the threshold, there are a number of concerns about Exhibit 39. Specifically:

A. There was no specific information as to who did the actual editing. There was no information about the qualifications of that individual or individuals or about the editing methods;

B. There was no information as to how decisions were made regarding what was edited out and what was not. There is a brief reference in the record to the events of that evening, but that vague reference does not specify the parameters that were used in the editing process.[9] This lack of information

---

[9] This representation is belied by the unfavorable character information about Roof remained in the edited tape. See, e.g., Vol. 3, p. 361 where Roof talks about putting his cat to sleep a month prior to the murder and where Roof further stated that he hated people and that he valued the friendship of animals more than the friendship of other human beings. This snippet of the interview is a striking example of the prosecutor's selective editing which had the effect of putting Roof in his worst possible light. This legal

indicates that the prosecution had virtually unfettered discretion to edit the tape in anyway it chose to do so;

C. The defense apparently had done no independent review of the edited tape prior to the tape being shown to the jury and thus apparently had no information about what had been edited and what had survived the editing

[p. 28]

process.[10] The defense also apparently had no information about who had done the editing or about the procedures used to accomplish the editing process; and

D. The Trial Court apparently had not viewed the tapes prior to the presentation of the edited tape to the jury. Thus, the Court had no information which would have enabled that Court to have determined the nature of the editing that had been done and to have further determined whether the editing process created any legal or constitutional issues which required the Court's attention prior to the tape being published to the jury.

In addition, there are very serious threshold concerns about the results of the editing process. Specifically, the trial was not about guilt or innocence. Roof had admitted that he

---

impact of selective editing is discussed infra.

[10] The record is not completely clear on this point. However, Detective LaRue's testimony indicates that he was the only one who had reviewed the edited tape and that his were the only initials which appeared on the tape for chain of custody purposes.

had killed Christopher Aalto. Accordingly, the only trial issue was Roof's mind-set and whether he was guilty of first degree premeditated murder or some lesser crime. As demonstrated by the appendix, the parts of the tape which were edited out focused on Roof's mens rea. Thus, among other things, the omitted parts of the video tape contextualized Roof's past, his history of anger and sudden mood changes, his attitudes toward people, his therapy, and his use of multiple medications to control his problems. All of these factors were material to the degree of Roof's culpability. Yet, the prosecution deliberately took that information out of the original tape with the result that these material facts

[p. 29]

were never before the jury.

**2. The Standard of Review**

If Roof's attorney had objected to the use of the edited video tape, any decision to admit the tape would have been reviewed for abuse of discretion. See, e.g., People v. McMillan, 213 Mich App 134, 539 N.W.2d 553 (1995); People v. Taylor, 195 Mich App 57, 489 N.W.2d 99 (1992).

As to constitutional issues surrounding the admission of the tape, factual findings would have been reviewed for clear error and legal issues would have been reviewed de novo. See, e.g., MCR 2.613(C); People v. Prelesnik, 1996 WL 553207 (Mich App 1996); People v. Craun, 159 Mich App 564, 406 N.W.2d 884, rev'd on other grounds, 429 Mich 859,413 N.W.2d 421 (1987); People v. Cheatham, 453 Mich 1, 551 N.W.2d 355 (1996); People v. Conner, 209 Mich App 419, 531 N.W.2d 734 (1995).

At the threshold, Roof submits that these standards should have been used by the Court of Appeals because of the "waive the waiver" argument made in the previous section. If this Court agrees, it would be appropriate to either summarily reverse the Court of Appeals or to remand for further proceedings using the correct review standard.

If this Court does not agree that Roof's waiver should be excused by the prosecutor's failure to assert waiver, Roof submits that relief is still warranted because the Court of Appeals did not make the "outcome-decisive" analysis mandated by this Court in Grant. Rather, the Court used pre-Grant standards.

[p. 30]

Alternatively, Roof submits that if this Court concludes that he did waive the video-tape argument by not preserving it before the trial court, relief is still appropriate because the multiple errors, either viewed individually or in their totality, were determinative of the outcome of this case. Accordingly, even under the Grant standard of review, Roof passes muster, and leave should be granted to correct the Court of Appeals' contrary decision.

### 3. The Evidentiary Errors

MRE 1002, the best evidence rule, states that "[t]o prove the content of a ...recording the original ... recording ...is required, except as otherwise provided by these rules or by statute". MRE 1003 authorizes the admission of a duplicate copy of the original unless there is doubt about the original's authenticity or unless the admission of the duplicate would be unfair. MRE 1001 (4) defines a "duplicate" as a counterpart

"which accurately reproduces the original".

The prosecutor offered the video tape as substantive evidence of Roof's guilt of first degree premeditated murder. Under the above rules, there would have been no evidentiary problem had the prosecutor offered and subsequently played the original video tape. See, e.g., People v. Burhans, 166 Mich App 758, 421 N.W.2d 285 (1988) (authorizing the use of a video tape made of the defendant taking a sobriety test following a traffic stop and evidence of alcohol usage).

Roof submits, however, that the face of the rules prohibit the use of a selectively edited tape when the original is available. The original is certainly the best evidence under MRE 1002. The edited tape is not a duplicate under MRE

[p. 31]

1001 (4) and MRE 1003. Accordingly, none of those rules justify the use of the edited tape.

The case law also indicates that it was error to admit the edited tape.

At the threshold, the central holding in the cases is a requirement that the copy or duplicate exactly mirror the original. Thus, the copy is admitted because the Court has sufficient information from which to conclude that there has been no alteration from the original.

For example in Matter of Estate of Christoff, 193 Mich App 468,484 N.W.2d 743 (1992), the issue was whether a photocopy of a will could be introduced into evidence. The probate judge refused to accept the photocopy because, among

other things, the copy did not have an original signature on it. The Court of Appeals reversed, reasoning since there was no question about the authenticity of the original or about the accuracy of the copy and since the original of the will was unavailable, the copy of the will should have been admitted. The key point in the analysis was the court's conclusion that the copy exactly mirrored the original. The same analysis was used in Joba Construction Co., Inc. v. Burns & Roe, Inc., 121 Mich App 615, 329 N.W.2d 760 (1982) (copy of corporate minutes okay when originals were unavailable) and Peebles v. City of Detroit, 99 Mich App 285, 297 N.W.2d 839 (1980) (copy of contract was admissible when original was not available and there was no question about the authenticity of the original or the accuracy of the copy). Roof submits that the holdings of these cases should have caused the rejection of the edited tape. It was not the best evidence and it did not

[p. 32]

reflect the contents of the original tape.

In People v. Schram, 98 Mich App 292, 296 N.W.2d 840 (1980), a security service recorded noises being made during a burglary. The police made a filtered copy of the tape for the purpose of reducing background noise. The tape was not otherwise altered.

Importantly, the Court took a number of steps to assure that the filtering process did not produce an inaccurate reproduction of the original. Specifically, the trial judge did the following:

A. Listened to the testimony of an expert who

explained how the filtering was done and who further explained that the filtering did not alter the original in any significant way; and

B. The trial judge personally listened to both recordings and was accordingly able to conclude that the only difference between the original and the filtered tape was the reduced amount of background noise.

Because of these precautions, the appellate court was able to conclude that the copy accurately reflected the original and therefore that the copy was sufficiently reliable to be admitted and to stand in the place of the original. See, also, Fountain v. Hall, 342 F.2d 849 (4th Cir. 1965). Both cases were cited by the Court of Appeals in support of its holding. In each case, significant steps were taken to assure that the copy accurately reflected the entire content of the original.

Roof submits that Schram demonstrates the evidentiary flaws in this case

[p. 33]

and further that the case stands for the proposition that the tape recording should not have been admitted. Specifically, in Roof's case, there were absolutely no precautions taken by the Court to assure that the edited tape accurately reflected the content of the original. There was no evidence presented about the editing process. There was no evidence about how the prosecutor selected which portions of the original were to be edited. There was no comparison between the original tape and the edited version to assure that the edited version fairly reflected the content of the interview. The Court did not listen to or compare the tapes prior to the edited tape being played to the jury. Thus, the trial judge was in no position to evaluate

whether the edited tape fairly reflected the content of the original. See, also, People v. White, 144 Mich App 698, 376 N.W.2d 184 (1985) (which upheld the playing of a tape of a witness's testimony for the jury when there was no issue of accuracy and where precautions were taken including the judge and all attorneys listening to the tape before the it was published to the jury to assure that the tape accurately reflected the witness's trial testimony).[11]

Roof submits that the problem with the edited tape was so obvious that the trial judge should have acted sua sponte and regardless of any objections from the attorneys. Moreover, plain error principles should have triggered appellate review

[p. 34]

because the procedures used by the trial judge were clearly inadequate. Cf. People v. Grant, 445 Mich 535, 520 N.W.2d 123 (1994) and its discussion of plain error and United States v. Olano, 113 S.Ct. 1770 (1993).

People v. Lester, 172 Mich App 769, 432 N.W.2d 433 (1988) also illustrates the error made by the trial and appellate courts with respect to the instant case. In Lester, the police recruited defendant's friend for the purpose of wearing a wire and recording any inculpatory statements that the defendant

---

[11] This procedure was used because a written transcript was not available and because this particular court routinely made audio tapes of proceedings as a backup aid for the court reporter. The jury knew about the backup taping system, and the tape was the only way for the Court to grant the jury's request to listen to the testimony.

might make. At the time, the defendant was in the hospital recovering from unrelated injuries. The two men in fact had a discussion during a hospital visit during which the defendant made statements which incriminated him in an armed robbery. The tape was eventually played for the jury. While the tape was being played, the jury was given a transcript to read.

One of the issues addressed by the Court of Appeals was whether it was appropriate for the jury to have been given the transcript while the tape was being played. The transcript was not verbatim, and the appellate court ruled that it was error to admit it because it reflected the subjective impressions of the police rather than the actual statements made by the defendant.

The appellate court was also concerned about the lack of safeguards regarding the accuracy of the transcript. Specifically, there was no stipulation about the transcript's accuracy. More importantly, the trial judge made no effort to ensure the tape's accuracy. The trial judge did not listen to the tape before it was played to the jury, and the individual who prepared the transcript did not appear in

[p. 35]

court to verify the transcript's accuracy. The Court thus concluded that it was the obligation of the trial judge to have taken affirmative steps to ensure the accuracy of the transcript before that transcript went to the jury.

To avoid the problem in future cases, the appellate court mandated that the following procedures were to be followed by trial courts in the future before a jury is allowed to consider a non-verbatim piece of evidence:

A. A stipulation should be sought agreeing that the item going before the jury is accurate;

B. In the absence of a stipulation, the transcriber should be required to testify about the accuracy of the item transcribed; and

C. The trial judge should make an independent determination about accuracy and reliability.

Lester is directly on point to Roof's case. At the threshold, it is clear that the edited video tape was not a verbatim reproduction of the original and that the edited tape reflected the subjective perceptions of the authorities regarding the parts of the interview which were to be presented to the jury. Thus, the use of the edited tape was prohibited by Lester's holding.

Moreover, it is clear that the trial judge did not follow the procedures mandated by Lester. There is no reason to treat a video tape differently from an audio tape. Additionally, the edited tape is equivalent to the edited transcript used in the Lester case. Since the edited tape went to the jury, as in Lester, it is irrelevant whether the original tape was available. Accordingly, under Lester, the

[p. 36]

admission of the edited tape and the failure to follow prescribed procedures for reliability was reversible error.

There is another line of cases which supports relief. In People v. Taylor, 18 Mich App 381, 171 N.W.2d 219 (1969), aff'd, 386 Mich 204, 191 N.W.2d 310 (1 971), the court

established a seven part test regarding the proper foundation for the admission of sound recordings. The requirements were "(1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement". 18 Mich App at pp. 383-384. See, also, People v. Parker, 76 Mich App 432, 257 N.W.2d 109 (1977); People V. Slaton, 135 Mich App 328, 354 N.W.2d 326 (1984).

In 1991, this Court addressed the vitality of Taylor after the 1977 amendments to the Michigan Rules of Evidence. People v. Berkey, 437 Mich 40, 467 N.W.2d 6 (1991). In Berkey, the defendant was charged with inducing his girlfriend to kill his estranged wife. During the course of the investigation, the police discovered a number of audio tapes which the victim had apparently made. The prosecution selected two of those tapes and played them to the jury. One of the tapes records a telephone conversation between the victim and the defendant over an impending visitation with the couple's children. The tape also recorded an

[p. 37]

angry confrontation when the defendant came to pick up the children. The second tape also recorded an argument which included threatening statements made by the defendant. A third tape was played by the defense which contained more conciliatory statements.

The defendant objected to the admissibility of the tapes, but they were admitted over objection. On appeal, the defendant argued that the tapes were not properly authenticated and cited Taylor in support. The Court of Appeals reversed, concluding that only the sixth Taylor factor had been satisfied and that the failure to meet the other requirements was reversible error.

This Court granted the prosecutor's application for leave and reversed the appellate court. This Court noted that Taylor pre-dated the 1978 amendments to the Michigan Rules of Evidence. There is now a specific rule MRE 901, which deals with authentication of proposed evidence. This Court concluded that Taylor was modified by the 1 978 rules and that MRE 901 was satisfied by the prosecutor's showing.

This Court further concluded that Taylor was not completely gutted by the rule amendment. However, the opinion left undecided the type of record that would trigger Taylor's requirements.

Roof submits that Berkey does not preclude the problem in this case which relates to the fourth Taylor requirement regarding any deletions from the recording. Since that requirement is consistent with the other cases upon which the appellant relies, the Taylor line of cases also supports the result which Roof seeks.

[p. 38]

There are several other reasons which demonstrate the serious error which occurred in this case. Specifically, a voluntary confession or admission is not conclusive evidence of guilt. A defendant is entitled to introduce evidence which

familiarizes the jury with the circumstances surrounding the confession, including the defendant's mental state when the crime was committed and when the confession was given.[12] See, e.g., People v. Hamilton, 163 Mich App 661, 41 5 N.W.2d 653 (1987); People v. Gilbert, 55 Mich App 1 68, 222 N.W.2d 305 (1974); Lego v. Twome, 404 U.S. 477 (1971).

Thus, in this case, the defendant was entitled to have the jury consider the interview as it was given, because it is only by such a presentation that the jury could contextualize Roof's comments about his mental state and Roof's comments about the crime. The bifurcated presentation served only to prejudice Roof by allowing the prosecution to structure the evidence in the manner most damaging to Roof and by depriving the jury of an opportunity to view the interview as it occurred.

Another seminal principle that was violated by the decision to admit the edited type focuses on the fact that a defendant who chooses to be tried by a jury has a right to a fair and impartial trial. See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968); People v. Miller, 411 Mich 321, 307 N.W.2d 335(1981). Here, the defendant did not receive such a trial because the prosecutor was allowed to "stack

[p. 39]

the deck" by structuring critical evidence in a fashion more favorable to the prosecution and more detrimental to the

---

[12] In this case, the taped interview took place shortly after the commission of the crime.

defendant's case.

Another line of cases deal with the Michigan requirement that, if a statement is presented to the jury, that jury is entitled to hear the entire statement without redaction or editing. See, e.g., People v. McElheny, 221 Mich 50, 190 N.W. 713 (1922); People v. Taylor, 98 Mich App 685, 296 N.W.2d 601 (1980); People v. Warren, 65 Mich App 197, 237 N.W.2d 247 (1975); People v. Hopper, 21 Mich App 276, 175 N.W.2d 889 (1970); Gillespie, Michigan Criminal Law and Procedure, 2d Ed., Sect. 465, p. 545 (stating rule and collecting cases). Since Roof's entire statement was available, the jury was entitled to see it in the chronological order in which it was given.

A final line of cases deals with the chain of custody of proposed evidence. The purpose of the chain of custody rule is to assure that it is "reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with" 2 McCormick, Evidence (4th Ed., Sec. 212); People v. White, 208 Mich App 126, 527 N.W.2d 34 (1994) (collecting cases). Depending on the facts, a break in the chain of custody may result in the inadmissibility of the evidence, in a requirement that the prosecutor lay a greater foundation before admissibility, or in a diminished weight to be given to that evidence. Id.

Here, it was undisputed that the edited tape had been altered from the original. However, the procedures or standards used to alter the tape or to select

[p. 40]

those portions of the original tape which would be included in

the edited tape were not clear from the record. Accordingly, at the very least, the prosecutor laid an insufficient foundation for the admission of the edited tape, and it should have been excluded for that reason as well.

In sum, Roof's application should be granted on the evidentiary issue for at least the following reasons:

A. A serious public policy question is presented in terms of whether a prosecutor should be allowed to selectively edit sound or audio recordings and, if so, under what circumstances should such editing be permitted.

B. As discussed infra, Roof believes that the use of the edited tape was outcome-determinative so that under any standard of review, Roof was denied a fair trial. It would be appropriate to grant leave to address that issue.

C. This Court has not revisited the scope of Berkey and its limitations on Taylor since 1991. This case presents an appropriate opportunity for this Court to revisit the issue and to clarify the scope of Berkey and the remaining vitality of Taylor.

**4. The Constitutional Issue**

The Fifth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants due process of law during their trials because every such defendant has a liberty interest at stake. See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Rochin v. California 342 U.S. 165 (1952). In federal law, due process is not a technical concept which has some sort of fixed content. Rather,

[p. 41]

"representing a profound attitude of fairness . . . 'due process' is compounded of history, reason, the past course of decisions, and stout confidence of the democratic faith which we profess...". Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-163 (1951) (Frankfurter, J. concurring). See, also, Morrissey v. Brewer, 408 U.S. 471,481 (1972).

Similar protections are proved by the 1963 Constitution, Article 1, Sect. 17 which guarantees a criminal defendant due process protections because that defendant's liberty interests are at stake. See, e.g., Lake Michigan College Federation of Teachers v. Lake Michigan Community v College, 518 F.2d 1091 (6th Cir. 1975). As with the federal constitution,.the touchstone of Michigan due process is fundamental fairness; the concept is flexible and the procedural protections needed in any given situation depend on that facts of each case. See, e.g., Dobrzenski v. Dobrzenski, 208 Mich App 514, 528 N.W.2d 827 (1 994); In re Brock, 442 Mich 101, 499 N.W.2d 752 (1993). The focus of the due process protection is the creation of reasonable restraints on governmental decisions which affect a defendant's fundamental rights. See, e.g., In re LaFlure, 48 Mich App 377, 210 N.W.2d 482 (1973). See, also, People v. Wiseman, 63 Mich App 137, 234 N.W.2d 429 (1975) (rules which affect the evidence presented and thereby deny a party the right to a fair and effective trial run counter to the fundamental and accepted notions of due process); Gile v. Hudnutt, 279 Mich 358, 272 NW 706 (1937) (same); People v. Shirk, 383 Mich 180, 174 N.W.2d 772 (1970) (even absent an objection to the introduction of evidence, fundamental

[p. 42]

fairness with respect to the defendant's guilt for the crime charged necessitates appellate review to prevent fundamental injustice).

In this case, there were absolutely no procedural safeguards employed to assure the reliability of the evidence. As a result, the prosecutor was given unlimited and unfettered discretion to selectively edit the tapes. As cases such as People v. Schram, 98 Mich App 292, 296 N.W.2d 840 (1980), People v. Lester, 172 Mich App 769, 432 N.W.2d 433 (1988) and People v. White, 144 Mich App 698, 376 N.W.2d 184 (1985) make clear, procedural safeguards are necessary to protect a defendant's rights and assure a fair trial.

Thus, the procedures employed in this case and the lack of oversight with respect to those procedures violated Roof's due process rights under both the federal and Michigan constitutions, and those constitutional violations are an independent ground for relief and an independent reason to grant a new trial.

Another aspect of this constitutional issue is that the appellate court did not address the rule of law that when there is a constitutional error, normal waiver rules do not apply. Thus, the appellate court can address the constitutional issue and grant relief if the error was outcome-determinative. People v. Grant, 445 Mich 535, 520 N.W.2d 1 23 (1 994). The failure of the appellate court to use the proper standard of review merits this Court's consideration and relief.

[p. 43]

**5. The evidentiary and constitutional errors were outcome determinative**

The real issue before the jury was Roof's state of mind and whether Roof's mens rea rose to the level of premeditation or whether that state of mind warranted conviction for some lesser crime. A review of the record indicates the following testimony about Roof's mind-set:

A. Two witnesses (Nance and Hofer) testified about derogatory statements which Roof had made about the victim on July 3d some three weeks before the killing. Both witnesses testified that they didn't take Roof seriously. Because of the nature of the statements and the time lapse, Roof submits that the testimony had little probative value about his mindset on July 27th.

B. A former girlfriend (Thompson) testified about other derogatory statements about the victim including at least two verbal statements to the effect that Roof would kill the child if he had a chance. Thompson did not take the statements seriously. Thompson also testified about Roof's violent mood swings and about her efforts, in conjunction with Roof's mother, to force him to get psychiatric help by attempting an involuntary commitment.

C. Other lay witnesses (Susan Roof, Ronald Roof, Penny Miller, Cindy Miller, Sarah Roof, Jeff Jackson) testified about Roof's psychiatric problems, violent tendencies, mood swings, and problems with the various drugs he was taking. This testimony gave the jury some information about Roof, but the testimony did not directly go

to the events of July 27th.

[p. 44]

D. Sally Meier and Dr. Austin Katz testified about Roof's most recent medical treatment and the switch in medication to Klonopin. This testimony provided background information, but, as with the other testimony, it did not provide any information about the defendant's state of mind on the night of the killing.

E. Doctor Charles Clark, the prosecution's rebuttal witness, testified in general about medication and his opinions about Roof's mental state, but this testimony was based on tests given after the killing. Additionally, Clark concluded that the tests were of no validity because of their extreme results. This testimony was also not probative because it focused on generalities rather than Roof's specific mind-set on the day of the killing.

F. The testimony of Kristen Johnston and Penny Miller was more to the point. Miller was an off and on girlfriend who was at Roof's house on the night of the killing. She testified that she did not notice anything wrong with Roof and that he appeared normal.

Kristen Johnston was the victim's mother. She also did not notice anything wrong with Roof. Her confidence in Roof was shown by the fact that she brought her child to Roof's home and left the child alone to sleep while she was talking with Roof and later when she slept herself.

Thus, there is nothing in the testimony of these two witnesses that indicated premeditation or any bad attitude

toward the victim in the hours that preceded the crime.

[p. 45]

There were no witnesses to the crime, and the only evidence about the actual killing and Roof's mind-set at that precise time frame came from the statements which Roof made during the video taped interview.

Roof submits that the video tape was thus the most probative and critical evidence on the issue before the jury. For purposes of this application, Roof respectfully urges this Court to review the content of the original and edited tapes to provide the Court with the necessary overview of the differences.[13]

The prosecution's version presented Roof in his worst possible light. That version portrayed Roof as a cold and heartless human being who took the life of a child without provocation, remorse, or hesitation.

The original version presented considerable information about Roof's past problems, the impact of those problems upon his conduct, his efforts to obtain help, and the effect of his medications upon him. On balance, the original tape shows Roof to be a deeply troubled young man. The tape indicates that Roof had had these behavioral and psychological problems for many years. It further shows that these problems worsened significantly after his return from the army. It also

---

[13] The Court's attention is also respectfully requested to Tab 3 which contains a summary of the deleted portions of the tape. (Tab 3).

shows that the change in medication, made just prior to the killing, also had a dramatic influence on Roof's behavior and mind-set.

In sum, the prosecutor's version strongly supported premeditation. The original version softened that picture of Roof and gave the jury additional reasons to

[p. 46]

consider convicting Roof for a lesser crime. Roof submits that the substantial differences between the tapes could have well influenced the jury and that this fact satisfies Grant's formulation.

Leave should be granted to address these important issues and to assure that Roof receives a fair trial, particularly given the seriousness of the crime and the severity of the penalty imposed.

### 6. The Appellate Opinion

Roof submits that the rationale offered by the Court of Appeals does not change the result. At the threshold, the Court of Appeals used a manifest injustice standard of review. As noted supra, Roof believes that it was error not to use the Grant analysis or alternatively conclude that the prosecutor's waiver or the existence of a constitutional required a different review standard.

The Court then concluded that there was no manifest injustice because the jury knew that it was viewing an edited tape, because the original tape was available, and because some of the omitted portions of the tape were admitted during

the defense case.[14] For the reasons discussed supra, Roof submits that this is the wrong analysis and further that the appellate opinion is contrary to Lester and other authorities discussed.

[p. 47]

For all of these reasons, Roof believes that the reasons given in the appellate opinion are insufficient and that review should be granted for the reasons stated in this Application.

* * *

---

[14] Roof submits that the appellate court made a serious factual error. The record, as well as a viewing of the original tape against the background of the trial transcript of the Defense Exhibit G, makes clear that only a small portion of the omissions were presented to the jury. The appellate opinion erroneously suggests that the jury saw the entire tape, albeit in a bifurcated manner, between the People's and defendant's cases.